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SUPREME COURT OF THE UNITED STATES

October Term, 1956

NO. ~~1068~~ 173

DR. H. P. DUFF, W. E. PRATT, FLOYD PRATT, H. H. HENSLEY, H. M. HENSLEY, DR. H. HENSLEY, and AUSTIN FIELDS, Petitioners,

versus

F. L. CISCO'S ADMR. (Fred Bullard, Administrator with the Will annexed of F. L. Cisco), and
FIDELITY & DEPOSIT COMPANY OF MARYLAND, Respondents.

On Petition for Writ of Certiorari to the Kentucky Court of Appeals.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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June 28, 1957.

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No. 1068.

DR. H. P. DUFF, W. E. PRATT, FLOYD PRATT, H. H. HENSLEY, H. M. HENSLEY, DR. H. HENSLEY, and AUSTIN FIELDS, *Petitioners,*

v.

F. L. CISCO'S ADMR. (Fred Bullard, Administrator with the Will Annexed of F. L. Cisco) and FIDELITY & DEPOSIT COMPANY OF MARYLAND, *Respondents.*

On Petition for Writ of Certiorari to the Kentucky Court of Appeals.

BRIEF FOR RESPONDENTS IN OPPOSITION.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Respondents, F. L. Cisco's Administrator and Fidelity & Deposit Company of Maryland, pray that the Petition for Writ of Certiorari to the Kentucky Court of Appeals be denied.

STATUTES INVOLVED.

[Ky. Stat. 165a-17; Acts of 1912, c. 4, p. 8, §17]

"The banking commissioner may, under his hand and official seal, appoint one or more special deputy banking commissioners, as agent or agents, to assist him in the duty of liquidating and distributing the assets of any insolvent bank. * * *"

[Carroll's Ky. Code, §18]

"Every action must be prosecuted in the name of the real party in interest * * *."

[Kentucky Court of Appeals Rule 1.090]

"In every appeal the appellant shall file with the record a statement showing:

"1. The name of the appellant or appellants, designated as such * * *."

STATEMENT OF THE CASE.

In November, 1928, Perry Bank and Trust Company of Hazard, Kentucky, closed its doors. The State Banking Commissioner appointed F. L. Cisco as his agent and Special Deputy Banking Commissioner to liquidate the bank. Cisco executed a bond to the Commonwealth of Kentucky with Fidelity & Deposit as surety.

In May, 1938, the court entered a final judgment confirming Cisco's final settlement and discharged Cisco and his surety (R. 281, 422).

In 1941 and 1943, three separate suits (later consolidated) were filed by seven individual creditors as class suits to surcharge Cisco's final settlement and to recover on the bond.

In March, 1942, the court adjudged that this kind of suit could not be maintained as a class suit and by final judgment dismissed the action as to all members of the represented class (R. 73). No appeal was ever perfected.*

In April, 1944, the defendants by special demurrer (R. 68-70, 77-9, 245-7, 388-96) and answer (R. 79-183, 414-22) denied the material allegations of the complaints and pleaded specially (R. 416) that:

> "Plaintiffs do not have legal capacity to sue, and there is a defect of parties plaintiff in each of the petitions filed by them in the following respects, to-wit:
>
> "(1) None of the said plaintiffs has made demand upon or requested the Banking and Securities Commissioner or the State Director of Banking to maintain any action on account of the matters set out in the plaintiffs' petitions herein."

In March, 1954, the trial court by judgment dismissed the complaints (R. 607) on the ground, among others, that the plaintiffs had not called on the Banking Commissioner to bring the action, or made him a

*Two years later, a Special Judge in the second and third suits, before consolidation, took a different view (R. 249-254), but the March, 1942 judgment had become final and binding on all members of the class at that time (R. 600-603).

party, although he had exclusive jurisdiction to liquidate insolvent banks (R. 595-600).*

On November 16, 1956, the Kentucky Court of Appeals affirmed the judgment of the trial court on the grounds that under the statute "the State Banking Commissioner had exclusive jurisdiction in the liquidation of insolvent banks," (2) he was "an indispensable party" to the action, and (3) "an action may not be maintained against a subordinate official without joining his superior as a party if the relief sought will require such superior to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him."

Although the Respondents had pleaded in 1944, and the trial Court had adjudged in 1954, that demand on the Banking Commissioner was a prerequisite and that he was a necessary party, the Petitioners did not make the constitutional claims they now rely upon until in January, 1957, when they filed their Petition for Rehearing in the Kentucky Court of Appeals.

*The Petitioners cite (Pet'n. p. 8) a pleading filed in 1953 (R. 324) to the effect that the records in the circuit court, the Banking Commissioner's office and other records were so incomplete that an audit was not possible. This was twenty-five years after the bank closed and the Petitioners' statement erroneously implies that Cisco was responsible for this condition.

ARGUMENT.

Three of the Petitioners have been dead many years without revivor of the action. The Petitioner, Dr. H. Hensley, died on March 27, 1943. The Petitioner, H. M. Hensley, died on March 26, 1946. The Petitioner, H. H. Hensley, died early in 1951 (R. 585-6).

Two other Petitioners, W. E. Pratt and Floyd Pratt, did not appeal to the Kentucky Court of Appeals. The only appellants in the Court of Appeals were Dr. H. P. Duff and Austin Fields (see Statement on Appeal to Kentucky Court of Appeals filed June 2, 1954).

Manifestly the three who have died and the two who were not parties in the Kentucky Court of Appeals, are not entitled to petition this Court for the writ.

FIRST POINT.

The Petitioners Have Not Shown Any Adequate Ground For Writ of Certiorari.

The Kentucky Court of Appeals construed the Kentucky statute to mean that the Banking Commissioner had exclusive jurisdiction to liquidate insolvent banks.

The Court had theretofore held that the Banking Commissioner was a necessary party to any suit brought against the deputy *before* the deputy's final settlement and discharge (*Tipton's Admx.* v. *Ball*, 256 Ky. 816, 821, 77 S. W. 2d 50; *Williams* v. *Byrd*, 263 Ky. 438, 439, 92 S. W. 2d 783, 784).

Here, that Court held the Banking Commissioner was a necessary party to a suit brought against the deputy *after* settlement and discharge. It said the relief sought would require the Banking Commissioner himself to take action (*Williams* v. *Fanning*, 332 U. S. 490). The decision should reasonably have been anticipated because of the prior decisions holding the Banking Commissioner to be a necessary party in suits brought before settlement and discharge. This decision was only a logical extension of those prior decisions.

That the precise question has not arisen since enactment of the statute in 1912 shows that this is not a question of great public importance. The case turns upon its own facts and will affect no others than the litigants.

Even if a writ should be granted, the Court will not likely reach the constitutional questions because of the presence of other controlling questions. For instance:

(*a*) The essential allegations of the complaints are denied in the answers (R. 79-182, 414) and the record brought up from the trial Court does not contain the evidence. Accordingly, the only question presented is the sufficiency of the pleadings to support the judgment (*Smith* v. *Corum*, 308 Ky. 397, 398, 214 S. W. 2d 599).

(*b*) Cisco was only an agent of the Banking Commissioner who was charged by statute with the duty of liquidating the bank. In carrying out the instruc-

tions of the Banking Commissioner, Cisco was immune from civil liability (*Cooper* v. *O'Connor*, 105 F. 2d 761; *Taylor* v. *Glotfelty*, 102 F. Supp. 7, 9; *J. F. Schneider & Son* v. *Watt* (Ky.) 252 S. W. 2d 898-901).

(*c*) There was no sufficient allegation of fraud to surcharge the settlement (*Wren's Ex'r* v. *Wren's Ex'r*, 126 Ky. 704, 708, 104 S. W. 737).

SECOND POINT.

The Constitutional Questions Relied Upon Are Raised Too Late.

Although the necessity of making the Banking Commissioner a party was specially pleaded in 1944 (R. 416), and decided adversely to the Petitioners by the trial court in 1954 (R. 595-99), the Petitioners did not either in the trial court, or in the Kentucky Court of Appeals before the decision, in any way assert the constitutional claims on which they now rely. They first asserted these claims in the Kentucky Court of Appeals in their Petition for Rehearing filed in January, 1957, which was overruled without additional opinion or comment in March, 1957.

By the decisions of this Court these Federal questions were not raised in time (*Forbes* v. *State Council of Va., etc.*, 216 U. S. 396; *Citizens Nat'l Bank* v. *Durr*, 257 U. S. 99, 106; *Herndon* v. *Georgia*, 295 U. S. 441; *Godchaux Co.* v. *Estopinal*, 251 U. S. 179, 181).

This is not a case where the first opportunity to raise these federal questions came with the Appellate Court's decision.

THIRD POINT.

The Kentucky Court of Appeals' Decision Does Not Deny the Petitioners Due Process of Law or Violate the Obligation of Contract.

The Petitioners contend that KRS 62.070 gave them a contractual right to sue on the bond without joining the Banking Commissioner.

The decision of the Kentucky Court of Appeals only holds, in the light of its previous decisions (*Tipton's Admx.* v. *Ball*, 256 Ky. 816, 821, 77 S. W. 2d 50) that prior demand on the Banking Commissioner, as the real party in interest, is necessary, and that he is an indispensable party. This is in no way contrary to the language of the statute.

The Kentucky Court of Appeals construed Ky. Stat. §165a-16, presently KRS 287.560, as giving the Banking Commissioner "exclusive jurisdiction in the liquidation of insolvent banks." It held that because of that fact he was an indispensable party. KRS 62.070 permits actions to be brought in the name of the Commonwealth "for its benefit or for that of any person injured." The Banking Commissioner, as the real party in interest, is "a person injured" by a breach of the bond, and is a necessary party.

In requiring demand on the Banking Commissioner and that he be made a party, the Court was merely

following a long-established rule in Kentucky which goes back as far as 1898 (see *Tipton's Admx.* v. *Ball*, 256 Ky. 816, at 820-1, 77 S. W. 2d 50).

The Petitioners did not attempt to comply with that statute. The statute provides that suits may be brought "in the name of the Commonwealth." The Petitioners did not bring their suits in the name of the Commonwealth (R. 1, 198, 329). The statute did not give any right to the Petitioners to bring the suits in their own individual names.*

This is not a case where the Kentucky Court of Appeals construed the statute contrary to a previous construction. The decision cannot be said to violate the contract clause or to deny due process (*Tidal Oil Co.* v. *Flanagan*, 263 U. S. 444, 449-53).

CONCLUSION.

The Petition for Writ of Certiorari should be denied.

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June 28, 1957.

*This bond did not contain any covenant for the benefit of third persons (*Keene* v. *Colker*, 1 Metc. (Ky.) 415). The covenant ran only to the Commonwealth (*Hughes* v. *Cotton*, 13 Bush (Ky.) 596).

Pursuant to Rule 33, I certify that I have served a copy of this Brief in Opposition to the Petition for Writ of Certiorari on the Petitioners; by depositing a copy thereof in a United States Post Office, with first-class postage prepaid, addressed to counsel of record at his post office address, to-wit: to Claude P. Stephens, Prestonsburg, Kentucky; to Joe Hobson, Prestonsburg Kentucky; and to Weldon Shouse, Security Trust Building, Lexington, Kentucky, all done this July 2, 1957, at Louisville, Kentucky.

Counsel for the Respondents.